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Essays

Representation and Capital Punishment

The Lawyers' Art: "Representation" in Capital Cases

James M. Doyle*

Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.

*Strickland v. Washington*¹

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1. 466 U.S. 668, 694 (1984).

In the age of Nietzsche, Marx, and Freud, representation has thus had to contend not only with the consciousness of linguistic forms and conventions, but also with the pressures of such transpersonal, transhuman, and transcultural forces as class, the unconscious, gender, race and structure. What transformations these have wrought in our notions of formerly stable things such as authors, texts, and objects are quite literally unprintable, and certainly unpronounceable. To represent someone or even something has now become an endeavor as complex and as problematic as an asymptote, with consequences for certainty and decidability as fraught with difficulties as can be imagined.

Edward Said²

The United States Supreme Court maintains that a jury's vote for a death sentence can embody the community's individualized moral judgment on a particular person.³ But what if lawyers in a capital case cannot produce an authentic portrait of the defendant for the jurors to evaluate? What if this is as true of good lawyers as it is of bad lawyers? If lawyers cannot provide this portrait, who will? What if an "authentic" portrait does not exist? Without such a portrait, isn't a reliable, individualized capital sentencing process an illusion?

When good death penalty lawyers argue against the death penalty they begin and end with the fact that most death row inmates have been subjected to the services of very bad lawyers indeed. Stephen Bright, the Director of the Southern Center for Human Rights, epitomizes this approach in his essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*.⁴ Bright presents a Homeric catalogue of condemned inmates who were represented by drunken lawyers,⁵ by sleeping lawyers,⁶ by crazy lawyers, by lawyers who referred to their client as "a little ole nigger man,"⁷ and by lawyers whose incompetence amounted to virtual disorientation.⁸

2. Edward W. Said, *Representing the Colonized: Anthropology's Interlocutors*, 15 CRITICAL INQUIRY 205, 206 (1989) [hereinafter *Representing the Colonized*].

3. See *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976).

4. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1832 (1994).

5. *Id.* at 1835.

6. *Id.* at 1843 n.53.

7. *Id.* at 1865; see also *Goodwin v. Balkcom*, 684 F.2d 794, 805 n.13 (11th Cir. 1982) ("little old nigger boy").

8. See, e.g., *House v. Balkcom*, 725 F.2d 608, 619 (11th Cir.), cert. denied, 469 U.S. 870 (1984) (noting that defendant's lawyers had not read new death penalty statute).

The transcripts of many capital trials are offensive to conscientious professionals. And as a tactical matter it is hard to quarrel with Bright's focus on inadequate representation: It is a vivid way to illustrate the vulnerabilities of the death penalty system. Besides, the performance of trial counsel is one of the most influential factors in the process by which a handful of homicide defendants is selected for execution. For anyone hoping to make some concrete improvement in the fairness of the capital punishment system, achieving a better level of defense services is almost certainly the most promising place to start.⁹ Still, fascination with the shortcomings of *bad* lawyers obscures a deeper issue. What do *good* lawyers do when they "represent" a death penalty client?¹⁰

9. *Report of Malcolm Lucas to ABA Task Force on the Death Penalty*, 40 AM. U. L. REV. 195 (1990).

10. The Supreme Court recognized that the Sixth and Fourteenth Amendments guarantee a defendant the right to counsel in criminal cases in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Although it was generally assumed that the right to counsel meant the right to "effective" counsel, various courts expressed the standard for "effectiveness" differently. See *Trapnell v. United States*, 725 F.2d 149, 153 (2d Cir. 1983) (commenting on experience with "farce and mockery" of justice as standard for ineffective counsel); Note, *Identifying and Remedying Ineffective Assistance of Counsel*, 93 HARV. L. REV. 752 (1980). The Supreme Court defined the federal standard in *Strickland v. Washington*, 466 U.S. 668 (1983). *Strickland* was a capital case, and the issue was not the defendant's guilt or innocence, but his counsel's failure to raise mitigating evidence at the sentencing phase of the trial. The language of the standard announced in the Court's opinion ("reasonably effective assistance of counsel") was not particularly controversial; even Justice Brennan, a perennial dissenter in death cases, joined the relevant portion of the opinion. *Id.* at 702.

There is an extensive body of commentary addressing ineffective assistance of counsel in general and ineffective assistance in capital cases in particular. This literature generally accepts the *Strickland* Court's assumption that bad lawyers will create unreliable sentencings, good lawyers reliable ones. See, e.g., Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245 (1990-1991); Bright, *supra* note 4; Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 229 (1983); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel*, 77 GEO. L.J. 413 (1988); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Cases*, 107 HARV. L. REV. 1923 (1994); Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461 (1987). A specialized body of literature, generally by and for practitioners, directly addresses the question of what a good lawyer should do. See, e.g., NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1987, amended 1988); MILLARD FARMER & JAMES KINNARD, TRIAL OF THE PENALTY PHASE (1981); Dennis M. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331 (1979); William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181 (1984); Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991); Kevin McNally, *Death Is Different: Your Approach to a Capital Case Must Be Different, Too*, THE CHAMPION, Mar. 1984, at 32. See generally ABA GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1990). A particularly acute effort in this genre is William Geimer, *Law and Reality in Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273 (1990-1991). A comprehensive review of these two lines of comment, the general and the particular, is provided in Welsh S. White, *Effective Assistance*

Lawyers in a capital case “represent” their client in two ways. They represent him in the familiar sense of speaking for him,¹¹ of providing a representative. But they also “represent” their client by shaping and presenting to a judge or jury a representation of the client. It is in this second sense of “representation,” expressing the relationship between a copy and an original, that good lawyers face difficulties of their own. American lawyers—even the best—operate in an adversary system concerned primarily with describing past events, not with portraying people. Adversary presentation ordinarily resolves questions of historical fact—What happened? Who did it? In what state of mind?—that only incidentally require inquiry into character. When a defendant’s character is proved, it is usually because his character provides circumstantial evidence of his deeds, not for its intrinsic interest.¹² The traditional issue is “Did he do the crime?” not “Is he otherwise worthy of life?” But the most dangerous aspect of capital sentencing is not the lawyers’ unfamiliarity with this broader focus; it is the fundamental nature of the process of representation.

When Edward Said writes that representation is “as complex and problematic as an asymptote,”¹³ he chooses an image that succinctly captures the problem. An “asymptotic” curve approaches a line more and more closely as it extends into infinity but will never meet it. A copy can resemble an original more and more, but it can never achieve identity with it. The consequences of this property of representation are an abiding issue in philosophy,¹⁴ philology,¹⁵ and

of Counsel in Capital Cases: *The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323.

The *Strickland* Court does not mention the ramifications of the truism “other people are difficult to know.” Justice O’Connor’s opinion for the Court in *Strickland* simply assumes that people can be known and described, and that to whatever degree people are difficult to know or describe, capable adversary advocacy will improve the situation to the point of “reliability.” In effect, the *Strickland* opinion assumes that an effective plea for mercy and a reliable portrait are the same thing. This Essay is meant to challenge that assumption.

11. Throughout this Essay I use the masculine pronoun when I refer to criminal defendants. This choice is not entirely arbitrary. Men greatly outnumber women on death row, and while many general observations concerning the process of representation would apply equally to men and to women, the particular history of the representation of women in our culture warrants separate treatment. See generally *THE REPRESENTATION OF WOMEN IN FICTION* (Carolyn Heilbrun & Margaret Higgonet eds., 1983). When I say “he” or “him” I mean “he” or “him.” Because many of the best capital defense lawyers are women and capital defense lawyers generally work in teams, I have used plural pronouns to refer to the defenders.

12. See generally 1 JOHN HENRY WIGMORE, EVIDENCE §§ 62, 192-218 (Chadbourn rev. 1970); Richard Uviller, *Evidence of Character to Prove Conduct*, 130 U. PA. L. REV. 845 (1982). Moreover, character evidence is generally offered one trait at a time (e.g., “honesty” to support credibility), not as a comprehensive portrait of an individual.

13. *Representing the Colonized*, *supra* note 2.

14. See, e.g., ARISTOTLE, *Poetics*, in *THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION* (Princeton University Press 1984); MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (A.M. Sheridan Smith trans., Pantheon 1972); MARTIN HEIDEGGER, *BEING AND TIME* (John Macquarrie & Edward Robinson trans., Harper 1962); MARTIN

literary criticism.¹⁶ In most accounts of representation, “[t]he representative or substitute is thus qualitatively different from the original, in part because an original is itself and is not contaminated by its difference.”¹⁷ Indeed, some go so far as to say that it is impossible to know whether an “original” exists, when everything is mediated by representations.¹⁸

I will not try to summarize the dense and extensive commentary on the question of representation; I simply want to draw attention to its existence.¹⁹ For my purposes it is not necessary to choose the view of Plato, or Foucault, or Derrida, only to remember their shared conviction that a writing is not the thing written about, a theatrical performance is not the event it ostensibly recreates, and to apply it to the question of whether the trial portrait of a capital defendant is *or can be* the defendant in any useful sense. The practice of many disciplines, anthropology for one, has been radically altered by the awareness that language is not a “transparent medium through which

HEIDEGGER, POETRY, LANGUAGE, THOUGHT (Albert Hofstadter trans., Harper & Row 1971); Friedrich Nietzsche, *On Truth and Falsity in an Extra-Moral Sense*, in 2 COMPLETE WORKS OF FRIEDRICH NIETZSCHE (M.A. Mücke trans., Russell & Russell 1964); PLATO, REPUBLIC, Book X (B. Jowett trans., Prometheus Books 1986). For recent surveys of the issue's development, see ALAN MEGILL, PROPHETS OF EXTREMITY: NIETZSCHE, HEIDEGGER, FOUCAULT, DERRIDA (1985); S. Halliwell, *Aristotelian Mimesis Reevaluated*, 28 J. HIST. PHIL. 487 (1990); D. Merwick, *Postmodernism and the Possibilities of Representation*, 31 AM. STUD. INT'L 4 (1993).

15. See, e.g., JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Spivak trans., 1976); JACQUES DERRIDA, WRITING AND DIFFERENCE (Alan Bass trans., 1978).

16. See, e.g., ERICH AUERBACH, MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE (Willard Trask trans., 1968); see also Michael Bal, *Telling, Showing, Showing-off*, 18 CRITICAL INQUIRY 556 (1992); Michael Holquist, *The Last European: Erich Auerbach as Precursor in the History of Cultural Criticism*, 54 MOD. LANGUAGE Q. 371 (1993).

17. Edward W. Said, *Criticism Between Culture and System*, in THE WORLD, THE TEXT, AND THE CRITIC 200 (1983) [hereinafter *Criticism*].

18. See FREDRIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM 93-96, 119, 179 (1991). I find this argument illuminating, even persuasive, but I want to make it very clear that my criticism of the prevailing death penalty scheme does not depend on it. The standard justification for the death penalty is invalid unless *both* of the *Strickland* Court's assumptions are correct. For the *Strickland* Court's reasoning to survive, people in general must be knowable and describeable, *and* lawyers must be able to know their clients and reliably describe them for jurors in the specific forensic context. Readers who are skeptical of the post-structuralist position in its most sweeping form should still consider its validity in the specific case of lawyers' effectiveness.

19. The primary justification for publishing this Essay is that doing so may provoke an examination of these issues by people better qualified than myself. My interest in these questions arose during the course of representing death row inmates in state and federal post-conviction proceedings, not out of any preexisting grasp of the vast literature on representation. I do not want to pretend that my own knowledge in that area is anything other than primitive. It will be only too clear that my perspective is a working defense lawyer's, not a scholar's. Among the differences these perspectives imply is the fact that I am using the term “representation” rather loosely, in its dictionary sense: “an image, likeness, or reproduction in some manner of a thing.” 2 OXFORD ENGLISH DICTIONARY 2498 (compact ed. 1971). In philosophy and criticism, the term itself is a contested one, used differently by different writers. See, e.g., MEGILL, *supra* note 14, at 209.

Being shone.”²⁰ Clifford Geertz describes the recognition this way:

The capacity of language to construct, if not reality “as such” (whatever that is), at least reality as everyone engages it in actual practice—named, pictured, catalogued, and measured—makes of the question of who describes whom, and in what terms, a far from indifferent business. If there is no access to the world unmediated by language (or anyway by sign systems) it rather matters what sort of language that is. Depiction is power. The representation of others is not easily separable from the manipulation of them.²¹

The transparency of the “language” of adversary presentation in capital sentencing is generally assumed.²² But is adversary process, even in the hands of its most dedicated and accomplished practitioners, ultimately as helpless as anthropology in the face of the challenges posed by representation?

This is a critical question. Throughout a capital trial, good lawyers painstakingly construct a representation that substitutes for the defendant. But if the jury votes for death, that process will be reversed. At an execution, a representation does not suffice, and the actual defendant will replace the representation the jurors evaluated. According to the Supreme Court, the validity of the death penalty derives from the fact that a death sentence embodies the community’s individualized moral judgment on a particular defendant.²³ That judgment depends on a reliable—and more or less transparent—relationship between the representation of the defendant

20. *Representing the Colonized*, *supra* note 2, at 206.

21. CLIFFORD GEERTZ, *AFTER THE FACT* 130 (1995).

22. This is not the case with regard to the more familiar problem of the guilt/innocence phase of an ordinary criminal trial. See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 173 (1983); Anthony Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992-1993); Milner S. Ball, *The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theatre*, 28 STAN. L. REV. 81 (1975); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743 (1994); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994).

23. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion). While many of the issues raised by the problem of representation are relevant to ordinary, non-capital sentencing proceedings, their radical impact on death sentencing practice is unique. A non-death sentence is constitutional so long as it is “proportional”: that is, consistent with a range or class of sentences for the same crime, or for defendants possessing similar criminal records. *Solem v. Helms*, 463 U.S. 277, 289-91 (1979). The validity of a death sentence raises different Eighth Amendment issues because it depends on *individualized* moral judgment for its justification. Mandatory death sentences are illegitimate, no matter how despicable the crime, or how horrendous the defendant’s record. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). The jury must still be free to consider any aspect of the defendant’s character. *Penry*, 492 U.S. at 319.

that the advocates present to the community and the individual defendant himself. But is it really true that “effective” lawyers will naturally produce individualized sentences? Can the relationship between a representation of a defendant and the defendant himself ever be transparent? This issue must be explored by reviewing the best lawyers at their best, not the worst lawyers at their worst. Bad lawyers are a challenge to the death penalty system in operation. Are good lawyers a challenge to the death penalty system in principle?

I. THE ACTOR AND THE ACT

Modern capital trials unfold in two phases. In the first phase, the jurors determine guilt or innocence in a conventional murder trial. If the jurors find the defendant guilty of murder, they determine in a second phase whether the defendant will be sentenced to death. This second phase will meet constitutional requirements only if it provides a vehicle for a unique, wide-ranging inquiry into every aspect of the defendant’s character or history that could be offered in mitigation.

The two phases are separate, but there is no firewall between them. It is axiomatic that lawyers who will be seeking mercy at the penalty phase of a trial must be wary of the portrait of their client that they paint during the guilt/innocence phase.²⁴ Frequently, there is tension between the strategic goals in the two phases: The most promising guilt phase defense—for example, alibi—can present the most problematic penalty phase situation if it fails. Having found that the defendant was lying about his alibi at the guilt phase, why should a juror believe, or even care about, his tales of child abuse at the sentencing phase? A “he didn’t do it” guilt phase defense undermines the defense “he’s sorry he did it” at the penalty phase.²⁵ Careful lawyers preparing to portray a capital defendant recognize that the exigencies of the guilt phase curb their freedom to represent their client. Some representations will have become impossibilities by the time the guilt phase is over. But the influence of the guilt/innocence phase on the representation of the defendant does not end with the elimination of a few defense options at the sentencing phase.

At a capital trial, several representations of a defendant compete for a juror’s assent. The prosecutor’s representation appears first. This position is crucial, and the defense lawyer’s performance cannot be discussed sensibly without a few general observations about the

24. See White, *supra* note 10, at 356-58.

25. Lyon, *supra* note 10, at 708. The guilt phase may also provide the opportunity to sow the seeds of “residual” doubt concerning the defendant’s guilt, enhancing the chances of a life sentence. See generally William Geimer & Anthony Amsterdam, *Why Jurors Vote for Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1988).

prosecution's approach. The prosecutor's representation is announced in the charging document, leaked to the media, outlined in the opening statement, and manifested throughout the prosecution's case-in-chief. Ordinarily, the prosecutor's representation of the defendant, although it will be reinforced in the penalty phase, will be complete by the end of the guilt phase. A juror will see everything that follows through the lens that the prosecutor's guilt phase presentation provides. Few prosecutors will neglect this opportunity. How will they use it?

Prosecutors will pose, and then answer, a grisly version of Yeats' question, "How can we know the dancer from the dance?" To the question "How can we know the murderer from the murder?" the prosecution answers, "You cannot, and you should not try." Prosecution representations of defendants during the guilt phase (which may occupy three weeks or more of the trial) will attempt to collapse the actor into the act. What sort of person is the defendant? He is the sort who would commit this murder.

True, prosecutors will make adjustments to the facts of individual cases. For example, capable prosecutors will try to anticipate and foreclose aspects of the defense lawyers' representation. If it seems likely that the defense will try to portray the defendant as the follower in a leader/follower murder, the prosecutor will emphasize the defendant's active role in the crime during the presentation of the prosecution's guilt/innocence case. If the crime was especially bloody, or the defendant unusually brazen, the prosecutor will certainly emphasize those facts. But the fundamental actor-into-act strategy will be operating beneath the surface details. This helps to explain why the existence of a paragon/victim is a luxury, not a requirement, for a death penalty prosecutor. Unremarkable victims can make the crime seem emblematic. They can seem very much like the jurors themselves: It was just the victim's appalling luck to have intersected with the defendant at the wrong moment.²⁶ It could have been anyone.

The prosecutors do not spend any more time than is absolutely necessary in proving a bad motive or intent. Sometimes the absence of comprehensible motive—the sheer stupid pointlessness of the killing—is the prosecutor's most effective tool. *Because* the crime is almost random it can evoke jurors' generalized fears where a crime

26. Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161 (1990), notes in discussing the Supreme Court's recounting of death penalty trials that "[t]he striking, horrifying, and unifying feature of these murders, as narrated by the majority, is that they are all, essentially, chance encounters between strangers, in which what is casually exchanged happens to be death." *Id.* at 170. In my view, the same can be said of the trial transcripts from which the Court's opinions derived.

that is entangled in a specific purpose might not. Besides, the prosecutor would rather not distract the jurors from the central point: The death penalty is called for not because the defendant yielded to a particular evil need on this specific occasion, but because the crime was in the defendant's nature; *anything* could have triggered it. The circumstances are not responsible; the murderer is responsible.²⁷ *Some* murder by this murderer could have been predicted all along. In the crime, the true defendant finally and comprehensively revealed himself.

I mention these themes because they create a situation very different from that which the adversarial tradition ordinarily confronts. The traditional criminal trial presents two mutually exclusive choices: The prosecution proved he did it, or the prosecution did not. The prosecution generates all the inculpatory facts and inferences and challenges any potentially exculpatory facts and inferences. The defense does the reverse. The result is a surplus of "facts" (real or alleged), inferences, and stories,²⁸ from which the jurors choose. Two versions of the event emerge; the jury accepts one and rejects the other, or supplies its own synthesis.

In capital sentencing trials the two sides seldom join issue in exactly this way. Because the defense in a capital case conveys a broad presentation of the defendant's character, a demonstration of capacity for life, while the prosecution seeks only to emphasize the horror of his act, the presentations are asymmetrical. The prosecution concentrates on one brief, vivid incident; the defense reviews an entire life.²⁹ The defense always offers some positive representation of the defendant. The prosecution (although it will heap scorn on the defendant's version) is under no pressure to offer a detailed counter-representation of its own. The prosecution knows it can withstand any representation a defendant offers so long as it can argue that *beneath* that representation abides the murderer as manifested in his crime. A prosecutor can be content if a capital defendant appears in silhouette: violent, effective, powerful. The defendant becomes absorbed into the jurors' imaginative experience of murderers from Cain in the Old Testament up until the morning's newspaper.³⁰ The archetypal figure of the murderer supplies much of the meaning in the prosecutor's representation of the individual on trial.

27. *Id.* at 171-72.

28. See Amsterdam & Hertz, *supra* note 22.

29. White, *supra* note 10, at 361.

30. Northrop Frye makes this point about archetypes in literature generally in NORTHROP FRYE, *ANATOMY OF CRITICISM* 100 (paperback ed. 1971). See also Dwight L. Greene, *Justice Scalia and Tonto: Judicial Pluralistic Ignorance and the Myth of the Colorless Individualism*, 67 TUL. L. REV. 1979 (1993); Nunn, *supra* note 22, at 751-52.

II. HOW WE “HUMANIZE”

Professor Welsh White, after surveying the best of the capital defense lawyers, reports their view that, “[i]n every case, the capital defendant’s attorney should seek to ‘humanize’ the defendant.”³¹ The term is not the Orwellian insult to the defendants that it appears to be; it is a realistic acknowledgment of the rhetorical power of the prosecution’s position. Unless defense counsel act, their client’s humanity will be obscured by the prosecutor’s representation. “Actor-into-act” is the prosecutors’ theory of representation; “humanizing” is the defenders’.

There is a consensus among accomplished death-penalty lawyers about the process of “humanizing.” Good capital lawyers collect all of the information—school records, medical history, family memories, the defendant’s own accounts—that bear on the defendant’s humanity.³² They then present this information in as compelling a form as possible in a “case for life.”³³ This is good representation, at least in one sense.

Missing from this summary is the fact that the two stages of “humanizing” also implicate all of the problems of “representation” in its second sense. When good lawyers scour the defendant’s past for records and accounts of the defendant, they are not collecting immutable facts expressed in transparent language; they are collecting *representations* of the defendant. When they present the case for life by selecting aspects of the defendant’s past for presentation, they are constructing a *representation* of their own. Defense lawyers inevitably are both consumers and creators of representations.

This doesn’t mean that all penalty-phase lawyering is equally futile. There is a range of performance available to lawyers in each of these roles. Some lawyers will be much better consumers of representations than others: more energetic in seeking out prior versions of the clients, more imaginative in recognizing their value, better critics of the images they are offered. Some lawyers will be much better creators of representations than others: more sensitive to their audience, more perceptive about their client’s plight, better able to mobilize the resources of the forensic setting to communicate their representation to the jury. It is not true that there is no higher level to which one can aspire in capital sentencing advocacy. The differen-

31. White, *supra* note 10, at 361.

32. *Id.* at 340-52. As one capital defense lawyer remarks, “You’ve got to become your client’s biographer.” James Traub, *The Life Preserver*, THE NEW YORKER, Apr. 8, 1996, at 47, 49 (quoting George Kendall, staff attorney, NAACP Legal Defense and Education Fund).

33. White, *supra* note 10, at 360.

ces between lawyers' performances at the opposite poles of this range are far more substantial than could be predicted by quantitative measures of effort expended.

At the high end of the performance range, lawyers might even vindicate Martha Nussbaum's belief that if one is able to "vividly experience the concrete particulars of another's life, imagine what it's like to live that life and, at the same time permit yourself the full range of emotional responses,"³⁴ then, as Phyllis Goldfarb puts it, "[T]he merciful, gentle, and patient attitude that you will naturally develop will not permit you to treat that person callously or inhumanely."³⁵ In other words, in presenting the defendant to the jury, lawyers might try to act less like lawyers, more like novelists, painters, directors: in short, more like artists. Perhaps the apparent choice between the two roles is a false choice. Perhaps one could combine them: use the lawyers' tools *and* the artists' tools. Both could help the jurors see that the defendant's role in the murder and the protections against his future dangerousness warrant a life sentence.

This combination of the artists' and the lawyers' tools may or may not be good courtroom strategy. Professor Nussbaum notes that "this stance does not determine any particular outcome" even if "it is frequently connected with mercy in sentencing."³⁶ Even so, it is helpful to keep the combination in mind as a possibility while thinking about capital cases. If nothing else, reference to the artists' methods is a reminder that neither artists nor lawyers are engaged in a straightforward, mechanical process of reproduction. Inevitably, both are vulnerable to distortion by, among other things, power dynamics and cultural stereotypes. I will try to illustrate the intervention of these forces by discussing recurrent challenges to capital defense lawyers. I've selected three from among many: first, the power-saturated nature of the materials that counsel will have available; next, the need for lawyers representing African-American defendants to defeat prevailing racial stereotypes; finally, the pressures on lawyers representing the mentally ill to fit their clients into preexisting caricatures. These examples do not exhaust the list of barriers to "transparent" representation, but I hope that they can begin to indicate the scope and the intractability of the problem.

34. MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 3 (1990).

35. Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65, 68 (1994).

36. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 94 (1995).

III. RELATIONSHIPS OF TRUST: ARTISTS AND MODELS

Capital defense experts assert that the cornerstone of any effective defense presentation is a “relationship of trust”³⁷ between the lawyer and the client. The emerging standard of care in capital cases requires that lawyers convince their clients to trust them.

But trust them to do what? Are the lawyers trusted to present the most truthful representation of the client? No criminal lawyer will accept an obligation to display the complete, unvarnished “truth” about a criminal defendant. The most attractive? Most attractive to whom? Attractive to the jurors, the lawyer, or the client? The client may see his exposure as mentally retarded or sexually abused as unbearably painful; the lawyers may see such exposure as the only hope for the client to escape the death penalty. Are the lawyers trusted to save the client’s life at any cost? By any means? Or trusted to allow him to face a death sentence with dignity or integrity?

It is no criticism of the lawyers who have written about this issue to point out they do not offer any general answer. After all, the medical profession has wrestled with a version of these problems throughout its history without resolving the tensions inherent in the treatment of people in life-threatening situations. Hippocrates’ injunction, “first do no harm,” is a good place to start, but in a context such as capital sentencing, where harms come in many forms and from many directions, and where one—death by execution—is so appalling, the Hippocratic oath can only take one so far. Most good lawyers feel that they should take every conceivable step to save their clients’ lives while helping the clients cope with any aftermath.³⁸ Implicit in the good lawyers’ answers is their determination that no trial will ever result in a choice between life and dignity if they can help it. But most would probably agree that in theory, some version of the choice could arise and the proper response to the choice could vary from case to case. Even lawyers who generally believe that “life at any cost” is the right approach can imagine that at some point, some case could become so hopeless and some client could be such a self-aware individual that “death with dignity” would be an appropriate goal. Besides, the question will rarely present itself as the stark decision “death versus dignity”; it will be a “slightly enhanced

37. White, *supra* note 10, at 374-75.

38. At least this seems to be implied by the emphasis on the lawyers’ duty to persuade (as forcefully as necessary) the defendant to the lawyers’ course that provides an element of the “evolving” standard of care. See, e.g., Michael Mello, *On Metaphors, Mirrors & Murderers, Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 912 (1990-1991); White, *supra* note 10, at 371-72.

chance for mercy versus a somewhat less respectful portrait." The specific terms of the relationship have to remain somewhat provisional.

Ultimately, what the lawyers need from the "relationship of trust" is the freedom to make these choices when they do arise. (And frequently, they arise in tactical settings that require an immediate response.) What the lawyers offer in return is the promise not to abuse their freedom. As in the physician-patient relationship, feelings of trust may develop in the attorney-defendant relationship, but whether trust develops or not, there is always a fundamental relationship of power. The best capital defense lawyers are scrupulous, ethical people: They have not sought this power for its own sake and they do not enjoy their possession of it, but they do have it. It is pointless to pretend otherwise. Their phrase "relationship of trust" is a statement about two different things: the desirability of ordinary decency in human behavior and the pragmatic advantage of lawyers' possessing both every revelation that the client can offer and the authority to employ them as the lawyer determines best. It looks as if there is a relationship of trust when the client tells the lawyers everything they want to know and the client follows the lawyers' advice, but behavior that counterfeits this situation would arise from a relationship of absolute hegemony and abject surrender.

Other disciplines acknowledge a "crisis in representation" because they recognize the dangers that hide in any process in which the strong describe the weak, the dominant culture describes the subordinated one. In psychologists' representations of their patients, or anthropologists' representations of native societies, the representations "bear as much on the representer's world as on who or what is represented."³⁹ Does this warning echo in the context of capital sentencing?

A capital defendant's encounter with his defense lawyers is never the client's first experience of being represented by a person of higher status; usually it is only the most recent in a very, very long series of such experiences. Most capital defendants—because of race, poverty, mental disability, youth, illiteracy, pathological family background, or some other reason—have spent their lives in subcultures of people who seldom represent themselves. When do members of these groups attract the attention of the dominant culture in a way that will leave some record? Where will lawyers find the paper trail of a capital

39. *Representing the Colonized*, *supra* note 2, at 224. For comment on representation in psychiatric accounts, see SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* (James Strachey ed. & trans., Basic Books 1958); MEGILL, *supra* note 14, at 321-32. See generally STEVEN MARCUS, *REPRESENTATIONS: ESSAYS IN LITERATURE AND SOCIETY* (1975).

defendant? They will harvest school, probation, military, medical, and work records. Every one of these sources will describe an encounter that revolved on an axis of power and implicated professional needs, conventions, categories, and stereotypes. The best lawyers will leaven these official documents with family memories, but the family is an institution that is far from innocent of power and its implications. The relationship between a father and a son is about more than power, but it is inescapably about power too. Sometimes a father representing a son can be as problematic a representer as a boss evaluating a worker. And what of a son representing himself to a father? *That* representation, itself, provides one source of the father's version.

A gigantic literature addresses these issues,⁴⁰ but let me describe one critique of representation from the social sciences. In *Weapons of the Weak: Everyday Forms of Peasant Resistance*, James C. Scott explores a Malaysian peasant village and assesses the claim that ethnographic accounts comprise a "full transcript" of peasant life.⁴¹ Scott carefully demonstrates how anthropologists can mistake various peasant behaviors—lateness, footdragging, unpredictability, noncommunication—for intrinsic elements of their culture, when in fact these behaviors are resistance strategies designed as protections against external modernizing pressures (with which the peasants would probably associate anthropologists). Is it not likely that similar strategies were played out when the African-American defendant was interviewed, as a child, by the white guidance counselor? When the sexually abused defendant was interviewed by his juvenile probation officer? The confusions that Scott describes are not exotic phenomena; they are to be expected. Scott's peasants employed the classic defenses of the vulnerable in the presence of the strong:

The fact is that power-laden situations are nearly always inauthentic; the exercise of power nearly always drives a portion of the full transcript underground. . . . [T]he *normal* tendency will be for the dependent individual to reveal only that part of his or her full transcript in encounters with the powerful that it is both safe and appropriate to reveal. What is safe and appropriate is of course defined rather unilaterally by the powerful. The greater the disparity in power between the two parties, the greater the proportion of the full transcript that is likely to be concealed.⁴²

40. See generally W.J.T. MITCHELL, *ICONOLOGY: IMAGE, TEXT, IDEOLOGY* (1986); HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* (1968).

41. JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* 200-04 (1985); see also *ANTHROPOLOGY AND THE COLONIAL ENCOUNTER* (Talal Asad ed., 1973).

42. SCOTT, *supra* note 41, at 286. It seems to me that in the extreme context of capital defense representation these power-driven distortions will affect even lawyers who are fully

The illiterate, the mentally ill, the retarded, the abused, the poor, all the members of all of the outcast and stigmatized groups learn to depend on concealment, dissimulation, noncooperation.

Capital defense lawyers cannot extricate themselves from this dynamic. They will always be dependent to some degree on earlier representations of the defendant. In the specifics of the encounter between the lawyer and the client and in the contrasting cultural situations that formed their lives, the lawyers are placed in the dominant, the clients in the subordinate, position. Power, as such, is only one of many forces that intervene in representation. How many of us know ourselves well enough to describe ourselves comprehensively to another? How many of us have never chosen to represent ourselves differently to different people, or to the same people in different situations? In collecting their clients' histories, capital defense lawyers are collecting impressions of the clients formed in complex incidents charged with conflicting elements. Even very good lawyers will see their clients through a haze of "transpersonal, transhuman, and transcultural forces [such] as class, the unconscious, gender, race and structure."⁴³ The depth of the haze will vary, but even a quite passionate desire to pierce its veil⁴⁴ is unlikely to succeed entirely.⁴⁵

These problems are magnified by the fact that trial lawyers depend on a second "relationship of trust." It is a primordial commandment of trial advocacy that advocates must win and hold the trust not only of the clients, but also of the jurors.⁴⁶ It is axiomatic that a jury must first trust a lawyer to trust that lawyer's case. Volumes have been written to explain to lawyers how they should speak, dress, even feel, to create this effect.⁴⁷ For now it is probably enough to say that the

committed to the models of practice described by such works as Stephen Ellman's *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993), or Charles Fried's *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). Even where friendship is a fact, not a metaphor, a situation in which one friend inherits the responsibility for saving (or losing) the other's life will necessarily influence their behavior.

43. *Representing the Colonized*, *supra* note 2, at 206.

44. Indeed, there may be nothing beneath the veil. Many have argued that no "pure" human identity exists beyond these social forces. *See generally* JAMESON, *supra* note 18.

45. For example, what European seemed to identify himself more closely with a subordinated group than T.E. Lawrence? Lawrence risked his life in the Arab Revolt and attacked the British for the Revolt's betrayal. But read Lawrence now with the problem of representation in mind and it is hard to miss the extent to which in Lawrence's hands the Arabs' story became Lawrence's story; the Orient's disappointment became Lawrence's disappointment. *See* EDWARD W. SAID, ORIENTALISM 241-44 (1979). To Arab eyes, Lawrence, for all of his fervid dedication to the Arab cause as he saw it, now looks to be an arch-Orientalist and his writing about Arabia seems to be a paradigm of distortion. *See, e.g.*, SULEIMAN MOUSA, T.E. LAWRENCE: AN ARAB VIEW (1966).

46. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 133 (1986).

47. *See, e.g.*, ANTHONY AMSTERDAM ET AL., TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 335 (ALI-ABA Joint Comm'n on Continuing Legal Education, 3d ed. 1974).

sum of this mountain of advice is that the lawyers cannot stray too far from the accepted wisdom of the prevailing culture. Lawyers who appear to think themselves “better than” the jurors (or who just seem weird) are very unlikely to persuade them. Standing in front of a jury, arguing, “Here’s something *you* have never thought of” is a trial lawyer’s nightmare. Lawyers’ rapport with a jury is carefully built during the course of a trial, and lawyers are painfully aware of the fact that it can vanish in an instant. Lawyers have a mediating role.⁴⁸ That role is enough to thrust even lawyers who could somehow detach themselves personally from the prevailing culture back into its gravitational field.⁴⁹

The constraint imposed by the jury is more important than it seems because the two elements of “humanizing” are not consecutive. For the sake of clarity, I’ve been writing as though, first, the lawyers collect all of the facts, and, *only then*, begin to shape their own representation. Actually, the two processes of humanizing are concurrent. *While* the lawyers are collecting the representations of others, they are at work on their own, or at least on two or three rough alternative sketches. The job of collecting is active, critical, selective: The lawyers are looking over their shoulders at the jurors while they are collecting.⁵⁰ It is possible only in theory (and perhaps not even there) to “know everything” about a client’s background. The fraction that the lawyers do learn is a result of their work: They ask some questions, not others; they follow some leads, let others drop. What they find is shaped by what they are seeking. The lawyers sense a range of representations—a common catalogue of images—that a juror might consider worthy of mercy. The lawyers also anticipate the prosecutors’ armory of responses to particular representations: some so devastating that they can obliterate the jurors’ trust in the defenders and doom their client. Some lawyers might see this range as broader, or richer than do others, but no competent lawyer can stray beyond a range.

Within that range, the best “humanizing” lawyers will select, organize, and present their materials in ways that can be fairly and usefully thought of as literary.⁵¹ The fact that the originals of the lawyers’ representations exist in the real world does not change this. As Raymond Williams has pointed out, even works that insist on their roots in everyday reality—works such as Orwell’s famous essay,

48. Clark Cunningham, *Lawyer as Translator*, 77 CORNELL L. REV. 1298 (1992).

49. See Nunn, *supra* note 22, at 800-02.

50. See generally White, *supra* note 10, at 340 (assuming that “investigating for mitigating evidence” must suppose preexisting understanding of what is mitigating).

51. See Goldfarb, *supra* note 35, at 68.

Shooting an Elephant—can be profoundly literary in their conception and in their execution.⁵² When Andrea Lyon recommends that capital lawyers “[g]et personal records and objects from the family such as photographs, report cards, favorite books, or even a baseball mitt,”⁵³ she is repeating Henry James’ advice to novelists: “Dramatize! Dramatize!”⁵⁴ Lawyers who follow this advice will be doing more for their clients than lawyers who do not. Here, as elsewhere, Professor White’s “evolving standard of care” in capital defense shows improvement over routine approaches by providing a more vivid, empathetic portrait of the defendant. But the usefulness of the literary model can extend only so far.

“Humanizing,” when it is pursued with all the talent, technique and energy that the best lawyers can deploy, will help the jurors see the defendant as *a* human. In defending any murder case, this is a difficult and important step in the right direction. But will this talent, technique, and energy enable the jurors to see *this* human? The nature of the sentencing process turns on the second question, and confronted with that question, the artist/lawyer analogy breaks down completely. Conrad had a model for Kurtz,⁵⁵ but he was not required to tether his fictional creation to the flesh-and-blood model that originally inspired him. Everyone understands this to some degree. The Belgian officer of the Katanga Company who was the inspiration for Kurtz was evidently a very bad man,⁵⁶ but no one would consider actually executing him on the authority of Conrad’s portrait. The novelists’ allegiance is to the artistic truth of the characters they have created. The artists’ power grows from that allegiance, not from meticulous efforts to describe the external world. For a novelist, there is a moment at which “resemblance fades, invention, imagination, the creative instinct—whatever you like to call it—takes over.”⁵⁷ Besides, in pursuing the artistic truth, a novelist has no reason to care whether his readers dislike his character, even wish him dead.⁵⁸

52. RAYMOND WILLIAMS, *GEORGE ORWELL* 51 (1971) (citing George Orwell, *Shooting an Elephant*, in 1 *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL* 235-42 (Ian Angus & Sonia Orwell eds., 1968)).

53. Lyon, *supra* note 10, at 705.

54. Quoted in ANTHONY POWELL, *FACES IN MY TIME* 97 (1982).

55. See NORMAN SHERRY, *CONRAD’S WESTERN WORLD* 95-124 (1966) (discussing Conrad’s *Heart of Darkness*).

56. *Id.*

57. ANTHONY POWELL, *MESSENGERS OF DAY* 60 (1978).

58. The effect of this difference between the advocates’ and the artists’ perspectives is well illustrated by a conflict between Millard Farmer, a revered capital defense lawyer, and Tim Robbins, the director of the film *DEAD MAN WALKING* (Polygram Films 1995). Both men are death penalty opponents, but Robbins enraged Farmer by portraying his death row inmate as a racist and an anti-Semite. In Farmer’s version of their conversation:

The conversation about the movie script continued with Farmer attempting to persuade Tim the director, and Tim the person, to remove the anti-Semitic and racist remarks made

Few lawyers possess the talents of Joseph Conrad, but some lawyers might. My point is that even Conrad's talents could not ensure that lawyers' portraits of actual defendants would be reliable representations for a jury in the death penalty context. The mark of the artist is the ability to make something *new* from the raw material of experience. A novelist is creating a reality, not representing one.⁵⁹ Literary power will increase the chances of a life verdict; that is not the same thing as increasing the transparency of the relationship between the original defendant and the lawyers' copy. In fact, the more one thinks about applying literary talent or technique to representing a capital defendant, the less "transparent" the sentencing process seems.

IV. RACE AND REPRESENTATION: EVIDENCE OF THINGS UNSAID

At every stage of the capital punishment process, from the decision to seek the death penalty to the decision to impose it, African-Americans are particularly likely to be selected for execution. Their defense lawyers face specific challenges, for the task of representing African-American defendants does not begin with a clean slate. Before his capital trial even starts, an African-American defendant is awash in the "transpersonal, transhuman, and transcultural" forces to which Edward Said refers.⁶⁰ A history of prejudice and stereotype

by the death row inmate character. The movie character, Robbins explained, was not going to have the name of a real death row inmate and, besides, the real death row inmate had, according to the book, used such words. Farmer argued that the issue was beside the point. He knew the real death row inmate being portrayed. Farmer knew that the light in which Robbins was portraying the inmate's conduct was both unfair and unrepresentative of the many death row inmates Farmer has known and represented. . . . Robbins countered that movies have to create an impression in a short period of time.

Millard Farmer et al., *Death Is Different: Reducing the Politically Acceptable Correct Executions*, THE CHAMPION, Nov. 1995, at 6, 9. In recent work, Professor Nussbaum acknowledges that negative traits of the sort that novelists rely upon are as "human" as positive ones. For lawyers they will be less useful, even dangerous. NUSSBAUM, *supra* note 36, at 94. For example, in her discussion of Richard Wright's novel *Native Son*, Nussbaum points to many elements of Bigger Thomas's situation that make Bigger more understandable but could also seem to jurors to make him a permanent, insoluble danger. *Id.* at 93-97.

59. See *Criticism*, *supra* note 17, at 198-200. William Simon argues that the creation of fictitious client-figures is an endemic tendency in adversary advocacy. See William Simon, *Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29. For a sensitive account of the temptations that stereotypes present to defense lawyers, see Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1 (1994).

60. See *Representing the Colonized*, *supra* note 2. On the issue of discrimination in capital cases and in criminal justice in general, see generally SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989). See also McCleskey v. Kemp, 481 U.S. 279 (1987); Norval Morris, *Race and Crime: What Evidence Is There That Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111 (1988). For excellent historical studies of race in operation in the capital punishment system, see ERIC W. RISE, *THE MARTINSVILLE SEVEN: RACE, RAPE AND CAPITAL PUNISHMENT* (1993); GEORGE

pervades the process. How do defense lawyers try to free their client from this heritage?

It may help illuminate both the specific challenges of representing Black defendants and the more general question of representation in capital trials if I describe two art exhibitions, staged concurrently, that investigated the question of race and representation: the Museum of Modern Art's *Jacob Lawrence: The Migration Series*,⁶¹ and the Whitney Museum's *Black Male: Representations of Masculinity in Contemporary American Art*.⁶²

Jacob Lawrence painted *The Migration of the Negro* in 1940 and 1941. The series consists of 60 panels of uniform size, painted in bright colors and simplified, exaggerated forms reminiscent of Matisse or Picasso. A short caption accompanies each painting. The series, from the first panel ("During World War I there was a great migration north by southern African Americans") to the last ("The migrants kept coming"), presents the grand historical narrative of the African-American experience from the First World War until the beginning of the Second. It includes pictorial accounts of poverty, lynching, railway journeys, and work in the stockyards and steel mills, organized into a series of storyboards. If the *Migration Series* were extended backward in time, it would include captivity and slavery;⁶³ if it were extended forward into our own era, it would include the deindustrialization of the cities,⁶⁴ the disintegration of the family, the breakdown of the urban educational system, the plague of drugs.⁶⁵ The *Migration Series* presents in panorama the shared heritage of African Americans as a group: Its subject is the larger social context of each African American's life.

The Whitney's exhibit, *Black Male: Representations of Masculinity in Contemporary American Art*, focuses on one aspect of that shared heritage: the fact that African Americans, since their arrival in this country, have seen "tens of thousands of the most heinous representations of black people, on children's games, portable savings banks, trade cards, postcards, calendars, tea cosies, napkins . . . nothing but images of black people devoid of reason, simian or satanic in ap-

C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY: LYNCHINGS, MOB RULE, AND "LEGAL LYNCHINGS" (1990).

61. Thirty of the Migration paintings belong to the Museum of Modern Art, thirty to the Phillips Collection. The entire series is published in JACOB LAWRENCE: THE MIGRATION SERIES (1994) [hereinafter MIGRATION].

62. BLACK MALE: REPRESENTATIONS OF MASCULINITY IN CONTEMPORARY AMERICAN ART (Thelma Golden ed., 1994) [hereinafter WHITNEY CATALOGUE].

63. See generally EUGENE GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1973).

64. See generally NICHOLAS LEMAN, THE PROMISED LAND (1992).

65. See generally ELLIOT CURRIE, RECKONING (1993).

pearance, and slothful, lustful, or lascivious in nature.”⁶⁶ The Whitney exhibit is organized around the recognition that the experience of *being represented* by others is a central feature of African-American life. Thelma Golden, *Black Male’s* curator, quotes an essay by Kobena Mercer to explain the exhibit’s rationale:

Overrepresented in statistics on homicide and suicide, misrepresented in the media as the personification of drugs, disease and crime, such invisible men, like their all-too-visible counterparts, suggest that black masculinity is not merely a social identity in crisis. It is also a key site of ideological representation, a site upon which the nation’s crisis comes to be dramatized, demonized, and dealt with⁶⁷

And so, *Black Male* surveys the representations of Black men that have bombarded us over the past thirty years.⁶⁸

Juxtaposition of these exhibitions makes three things clear. First, contemporary American culture contains only a very rudimentary assortment of images of Black men. The menu sometimes seems to include only a Manichean selection of Good Blacks and Bad Blacks—Bill Cosby and Willie Horton.⁶⁹ Second, this poverty of images can have enormous social consequences, especially in forensic settings.⁷⁰ There is no reason to hope that jurors are immune to the power of the representations of Black men that pervade our culture. Representations of Rodney King play a prominent role in *Black Male*. The video of the helpless King being beaten senseless plays continuously: What could seem more reliable than a video tape? But *Black Male* also anatomizes the ways in which the video was removed from its historical context during the trial of the police officers involved.⁷¹ Once this dehistoricization was accomplished, the all-

66. Henry Louis Gates, *Preface*, in WHITNEY CATALOGUE, *supra* note 61, at 11. See generally ALBERT BOIME, *THE ART OF EXCLUSION: REPRESENTING BLACKS IN THE NINETEENTH CENTURY* (1990); 4 HUGH HONOUR, *THE IMAGE OF THE BLACK IN WESTERN ART* (1989); BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* (1992). See also Henry Louis Gates, *The Trope of the New Negro and the Reconstruction of the Image of the Black*, 14 REPRESENTATIONS 129-56 (1988).

67. Kobena Mercer, *Engendered Species: Danny Tisdale and Keith Piper*, 30 ARTFORUM 75 (1992), quoted in WHITNEY CATALOGUE, *supra* note 61, at 19.

68. The portraits on display include Willie Horton, Robert Mapplethorpe’s objectified nudes, entertainment and sports icons from Michael Jordan to Bill Cosby, the “Central Park Wolfpack,” “blaxploitation” fantasy figures such as Shaft and Superfly, Malcolm X, gangsta’ rappers, and a host of others.

69. Professor Adeno Addis reports an instance of this dichotomy from the floor of Congress: A Congressman announced that Nelson Mandela was not Martin Luther King; (therefore) he was Willie Horton. Adeno Addis, *Hell, Man, They Did Invent Us: The Mass Media, Law and African Americans*, 41 BUFF. L. REV. 523, 561 n.130 (1993).

70. See Sheri Lynn Johnson, *Racial Imagery in Criminal Trials*, 67 TUL. L. REV. 1739 (1993).

71. Elizabeth Alexander, “Can You Be Black and Look at This”: *Reading the Rodney King Video(s)*, in WHITNEY CATALOGUE, *supra* note 61, at 91.

white jury resorted to the traditional images of the Black male in America. These images—"buffed-out," "probable ex-con," "like a wounded animal"—were effectively marshalled by the lawyers for the Los Angeles police.⁷² As Elizabeth Alexander writes in an essay in the exhibition catalogue, "[C]odes erased Rodney King's individual bodily history within the event itself as well as a collective African-American bodily history, and supplanted it with a myth of white male victimization."⁷³ Finally, correcting this situation requires (among other things) restoring the larger historical context to the person represented. The images displayed in the *Black Male* exhibition look entirely different to someone who understands (for example, through the *Migration Series*) the facts of the collective historical narrative than to someone who has never heard that narrative. The survival of the contemporary Willie Horton stereotype of the African-American man—powerful, dangerous, indifferent to pain—that led to the acquittal of King's assailants depends on ignorance of the fact that the history of the Black man in America is characterized by lynchings, beatings, and physical victimization. The African-American male's history is one of profound vulnerability and insecurity. The Whitney exhibition economically underlines this point by bracketing the Rodney King materials with references to slave narratives of whippings and the image of Emmett Till in his coffin.⁷⁴ Had the Simi Valley jury seen King in this context, it would not have been easy to agree that an 81-second beating by four armed officers was just necessary police work.

My point is not that artists' representations are always and necessarily "better" than others. Obviously, they are not. *Black Male* proves again and again (for example, through the Mapplethorpe materials) that artists' images can be both attractive and destructive. Works of art, after all, are produced by specific people in specific contexts, and neither the individuals nor the contexts are immune to the power dynamics and stereotypes that affect representation. My point is that artists can enrich and correct prevailing stereotypes if they choose. An artist has the power to imagine the Whitney images *with* the Lawrence series. This power has sweeping potential. The Whitney curators' gallery of Superflys, Mapplethorpean objects, and glaring gangsta' rappers provides a critical commentary on the problem of representation because the exhibition's curators, many of its artists, and most of its public know the historical narrative of the

72. *Id.* at 68.

73. *Id.*

74. *Id.* at 102.

Migration Series. But will the sentencing jury? If they do not, can the lawyers inform them?

Defense lawyers at a capital sentencing can never represent their client by using the Bill Cosby stereotype, so they must confront the astonishing confluence of social forces driving the jury towards society's default representation of the defendant: namely, Willie Horton. As Tricia Rose points out,

The white American public, many of whom only tangentially know any young black men personally, has been inundated with images of young black men who appear fully invested in a life of violent crime, who have participated in drug-related gang shoot-outs and other acts of violence for "no apparent reason."⁷⁵

It is a general axiom of social psychology that members of any "out group" will tend to look the same to members of "in groups."⁷⁶ Young Black men can accelerate this process by adopting a "hard" pose, by dressing, talking, and looking as much alike as they can—to outside eyes. (Teenagers do this everywhere, at every time: Disadvantaged teenagers are even more likely to conceal the "full transcript" of their lives behind a group mask.)⁷⁷ The conventions of the commercial mass media—in both its news and entertainment aspects—treat the essential difference, distance, and uniformity of inner-city Black men as permanent facts of nature.⁷⁸

Can good capital defense lawyers cure this situation by restoring the historical narrative to the courtroom? Can they, in effect, use *The Migration Series* to reconstruct some sense of shared societal responsibility for the acts of a Black male and trump the Willie Horton stereotype? It is not theoretically impossible. Certainly jurors are bombarded by the same biases and stereotypes as everyone else, but the forum of a jury trial can be a promising venue for transcending stereotypes. The real cure for stereotyped thinking is not the substitution of a different stereotype but a new way of looking at the world.⁷⁹ A jury trial, because of its intense concentration on the clinical details of a unique set of facts, might promote just that new way of seeing.⁸⁰ Unfortunately, a very broad array of practical

75. Tricia Rose, *Rap Music and the Demonization of Young Black Males*, in WHITNEY CATALOGUE, *supra* note 61, at 153.

76. See generally RICHARD MAJORS & JANET MANCINI BILLSON, COOL POSE: THE DILEMMAS OF BLACK MANHOOD IN AMERICA (1992).

77. Rose, *supra* note 75, at 154.

78. See generally Addis, *supra* note 69; James M. Doyle, *Into The Eight Ball: The Colonialists' Landscape In American Criminal Justice*, 12 B.C. THIRD WORLD L.J. 65 (1992).

79. See generally ERICH FROMM & T.W. ADORNO, THE AUTHORITARIAN PERSONALITY (1952).

80. James M. Doyle, *The Innocent Black Defendant: Two Stories*, 1 RECONSTRUCTION 132, 134-35 (1992).

courtroom considerations will constrain the best lawyers' ability to integrate Jacob Lawrence into their representations.

To begin with, there is the fantastic unwieldiness of the operation. Lawrence took 60 panels to portray the migration between the two wars; to bring the narrative up to date would take at least 60 more. And Lawrence *needed* 60 panels to produce his effect. Much of the power of the *Migration Series* derives from the cumulative impact of these 60 discrete images, each memorializing a single, inarguable fact. Any effort to compress the narrative forfeits this power. A Lawrence painting illustrating "They were very poor," or "The migrants arrived in Pittsburgh, one of the great industrial centers of the North" cannot be disputed. Trying to make things more complex opens the door to a "Yes, but . . ." response. Where do you find a witness to testify to these things? Where do you find a judge who will sit still for it? More inclusive rules of relevance govern the admissibility of evidence at the sentencing phase of a capital trial, but questions of relevance are still left to the discretion of the trial judge.⁸¹ Many trial judges, oblivious to the fact that racial imagery pervades the process even without specific mention, will be hostile to the substance of the presentation: They will see it as an unwarranted effort to "inject race" into a trial that was about, e.g., a liquor store hold-up, not a civil rights demonstration. Even judges who are willing to permit historical background presentation are very likely to limit its scope and dictate its form. The lawyers will not have the artists' absolute freedom to define their work.

This is a crucial difference. Defense lawyers will be acutely conscious of the fact that a partial presentation of the Lawrence materials will be much worse than no presentation at all. Deprived of the magisterial sweep of Lawrence's medium, the lawyers' version runs the danger of alienating the jurors entirely. The penalty phase of a capital trial is always a delicate balancing act. A factor like race or mental illness can be used to explain a defendant's crime, but the smallest slip could be catastrophic. Everything is lost if the jury (having just convicted the defendant of murder) interprets the use of mitigating material as an attempt to excuse the murder or evade responsibility.⁸² Using the Lawrence materials inartfully threatens to do just that: to display a murderer whining about *his* victimization. It seems to ask the jurors not only to excuse the defendant but also to excuse *en masse* all members of the thoroughly demonized group to which he belongs. An incomplete version of the Lawrence

81. See, e.g., *Rock v. Arkansas*, 481 U.S. 216 (1987).

82. See Geimer, *supra* note 10, at 288-89, 294.

materials will seem to be an effort not only to shed a measure of responsibility, but also to impose it on the community embodied by the jury itself.

Furthermore, the lawyers know that they cannot construct their account of the *Migration* in the privacy of their studio; they have to do it in the presence of a hostile prosecutor. Defense lawyers might hope only to add a dimension to their representation by including the Lawrence materials, but the prosecutor will immediately seize on the Lawrence materials as if they were the *whole* defense representation, not a supplement. Defense lawyers considering a presentation of the *Migration* story and its sequels will have these probable responses ringing in their ears.

The prosecutors' caricature of the Lawrence materials will include a number of potentially devastating points: (1) "He still hasn't accepted responsibility for his crime," (2) "This means he will kill again," (3) "He blames America, not himself," (4) "The defense slanders the millions of Black Americans who don't kill," (5) "Accept this excuse, and you will slander them too." There are answers to these assertions, of course, but defense lawyers weighing the benefits of presenting a truncated version of the societal responsibility narrative subject to refutation by these prosecutorial attacks will almost certainly decide that the benefits of the Lawrence materials are not worth the costs.

At best, the laborious and dangerous efforts to include the broad historical narrative will produce only a schematic version that, far from "humanizing" the defendant, will drive him deeper and deeper into the default identity assigned to the despised group to which he belongs. If good lawyers use the Lawrence narrative at all they will use it covertly, subliminally—in ways that are immune to adversary cooptation—and thereby run the very substantial risk that they will fail to communicate the story at all. In all likelihood, the narrative of general societal responsibility will play no visible part in the representation of the defendant that the defense constructs.

Students of representation would argue that such a representation is not only futile; it is false.⁸³ Derek Walcott makes this point in an astringent review of V.S. Naipaul's *The Enigma of Arrival*:

[If the Trinidadians] have neither Art nor Culture, neither flower gardens nor venerable elms it is because none of that was given

83. See, e.g., *id.* at 294-95 ("When jurors and the public appropriately reject absolute determinism, they commonly choose unlimited accountability, an equally flawed theory . . . capital defendants did not spring full blown onto the earth at the moment of their crimes."). See generally Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245 (1992).

to the slave or indentured worker. To write of this lack as though it were the fault of the African or Indian is not only to betray them but to lie.⁸⁴

Robin West, writing about the Supreme Court's death penalty opinions, notes that representations that are silent on the historical question

underscore rather than challenge the tendency to view the defendant as well as the act as inhuman, and thus to discharge him from the human community. The lack of an articulated narrative of shared responsibility for his criminality ultimately has the utterly predictable consequence of validating our desire to deny not only our shared responsibility for the defendant's violence, but our responsibility for the defendant's fate as well . . . [S]ilence validates our societal self-delusion that the capital defendant's fate is not inextricably linked, through chains of causation, responsibility, commonality and community, with our own.⁸⁵

It is impossible to say whether the inclusion of African-American history in the representations of African-American capital defendants would save many of their lives. Given the state of race relations in this country, it probably would not. Even if including the historical/social frame would help, courtroom reality is such that good lawyers cannot effectively include that historical narrative in their representations anyway, and probably should not try. Yet if they do not, the Willie Horton stereotype will survive. Whatever that means

84. Derek Walcott, *The Garden Path*, THE NEW REPUBLIC, Apr. 13, 1987, at 27-31 (reviewing V.S. NAIPUL, *THE ENIGMA OF ARRIVAL* (1987)).

85. West, *supra* note 26, at 170. By using the term "societal responsibility" I do not believe Professor West means (and certainly I do not mean) to imply societal involvement in sinister activity that creates societal *criminal* responsibility, only that many social decisions have consequences that fall unpredictably on society's members. The fact that some people are exposed to lead paint poisoning, some to malnutrition, some to inadequate protection against intrafamily abuse, and others to destructive public mental health systems, results from societal arrangements, even though these exposures were not intended and are sincerely regretted by those responsible. For a brilliant exposition that simultaneously takes an unsparing view of a particular criminal *and* places him in the overall cultural and historical context, see FOX BUTTERFIELD, *ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE* (1995). In compiling his portrait of Willie Bosket, "[t]he most violent criminal in New York State history" (according to the jacket copy), Butterfield relies on many of the documents I have discussed: probation reports, psychological evaluations, and accounts by family members. But Butterfield also attempts to integrate Bosket's story with his family history and to assess the impact on the family of slavery, and of the atmosphere of violence and obsession with "honor" that governed the region of South Carolina in which the family lived. To read Butterfield's book is to understand both how much insight might be gained by taking the comprehensive, historical approach advocated by Professor West and why it would seem to be madness for a lawyer defending a capital case to choose that approach. Another example of the light that an understanding of societal conditions can shed on an individual human is provided by Martha Nussbaum's discussion of the portrait of Bigger Thomas in Richard Wright's *Native Son* (1943). NUSSBAUM, *supra* note 36, at 93-98.

for the fate of the defendants, what it means for the community is very clear. The jurors will make their decisions based on a representation with something essential missing, because effective lawyers will avoid the historical material in fashioning their representation. Thus, their representation may be more attractive, more worthy of mercy, but it will also be incomplete.

V. ACTING CRAZY: REPRESENTING MENTAL ILLNESS

Authorities estimate that approximately half of the inmates on death row suffer from mental illness and that ten to 20 percent are mentally retarded.⁸⁶ When neurologist Dorothy Lewis examined fourteen juveniles on death row in 1989, she found that "every one of them had multiple handicaps, including various levels of neurological dysfunction and severe psychopathologies."⁸⁷ Professor White reports a leading capital defense lawyer's belief that "it's a rare case in which the capital defendant has no mental problems."⁸⁸

The Supreme Court has closely scrutinized the role of mental disability evidence in capital sentencing. Mental health is the area of mitigation in which the Court has tried hardest to clarify *Gregg v. Georgia*'s requirement that sentencing be individualized.⁸⁹ Beginning with *Eddings v. Oklahoma*⁹⁰ and progressing through *Penry v. Lynaugh*⁹¹ and *Boyde v. California*,⁹² the Court has struggled to outline the ways in which mental illness is constitutionally relevant to a death penalty proceeding. It is also the area in which the Court—in *Riggins v. Nevada*—most clearly indicated a belief that the right to individualized sentencing has a *mimetic* component: It includes a right to "represent" a defendant's individual predicament without state interference.⁹³

A few days after Riggins' arrest for murder he told a psychiatrist that he was hearing voices and having trouble sleeping.⁹⁴ Riggins advised the doctor that an antipsychotic medication, Mellaril, had helped him in the past. Mellaril was prescribed and the dosage gradually increased to a level that one psychiatrist testified was "toxic." Before trial, the defense moved for an order discontinuing the

86. White, *supra* note 10, at 338.

87. Dorothy O. Lewis et al., *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 588 (1988).

88. White, *supra* note 10, at 339.

89. 428 U.S. 153 (1976).

90. 455 U.S. 104 (1982).

91. 492 U.S. 302 (1989).

92. 494 U.S. 370 (1990).

93. *Riggins v. Nevada*, 112 S. Ct. 1810 (1992).

94. *Id.* at 1812.

medication, arguing that since the defense intended to present an insanity defense, Riggins was entitled to appear before the jury in his "true mental state."⁹⁵ This motion was denied. Thereafter, a medicated Riggins was convicted and sentenced to death. On appeal, he claimed that the forced medication affected his "attitude, appearance and demeanor" at trial. The Nevada Supreme Court upheld the conviction and sentence, reasoning that Riggins' rights were not violated because he was permitted to introduce expert testimony explaining to the jurors the effects of Mellaril on his demeanor.⁹⁶

The Supreme Court reversed. The Court found that efforts to prove or disprove actual prejudice from the record would be futile: The impact of the defendant's medicated demeanor on the jurors was impossible to discern from the trial transcript.⁹⁷ Justice Kennedy enlarged on this point in a concurring opinion:

The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight, and perhaps, be determinative of whether the offender lives or dies.⁹⁸

In effect, the *Riggins* case holds that if you claim that you are mentally ill, the state cannot deprive you of your ability to "act crazy" at trial. The *Riggins* opinion gives constitutional protection to the option of representing the defendant by enacting mental illness theatrically, rather than by simply explaining it verbally. The case seems to suggest that if the ideal defense lawyer has the pharmacological expertise to manipulate the dosage to just the right effect (within the range of medical safety), he has the license to do so. How will capital defense lawyers use this freedom to convey a representation to the jurors? How will this freedom contribute to individualized sentencing and "transparent" representation?

Capital defense lawyers do not have complete freedom in the area of mental disability. While race is a topic characterized by things that cannot be said in constructing a representation, mental disability is an area characterized by things that cannot be allowed to go *unsaid*. The problem for defense lawyers in a race-driven case is to find an antidote for the forces that confine their clients within existing, unambiguously dangerous, stereotypes. The problem for lawyers

95. *Id.*

96. *Id.* at 1813.

97. *Id.* at 1816.

98. *Id.* at 1819-20.

defending the mentally ill is to resist the forces that bend their representation toward caricatures that are superficially helpful, but ultimately hollow and unavailing.

To begin with, the language of many state statutes will drive the lawyers' portrait in the direction of specific levels or varieties of disability. In Georgia, for example, a mentally retarded defendant is protected from the death penalty,⁹⁹ while a schizophrenic defendant may, or may not be.¹⁰⁰ In addition, various state definitions of "mitigating circumstances" speak in terms of "substantial" or "extreme" mental problems.¹⁰¹ Even if the statutes did not exert this influence toward categorization, the jurors' attitudes would. Research resoundingly proves that there is a yawning gap between what mental health professionals will diagnose as mental disability and what jurors (or judges) will accept as a mitigating condition.¹⁰² According to one study, many people see the insanity defense as a sham because they insist on a "near total lack of comprehension" as an insanity standard.¹⁰³ In a careful study of the issue Michael Perlin notes that "[j]urors 'look for bizarre acts, sudden episodes, a defendant's genuine obliviousness to his own best concerns, and a pervasive inability to lead an ordinary life.'"¹⁰⁴

Many mentally disabled people show a range of symptoms, and some very ill people will show few symptoms at all. For many mentally ill and retarded people, the fact that they can, from time to time, show some ability to lead an ordinary life is a proud achievement.¹⁰⁵ The level of functioning of most people with mental disabilities presents a moving target: Certain people function better on some days, or at some dosages, or in some environments. But any lawyer who attempts to represent his mentally ill client in light of achievements as well as handicaps will create a representation inconsistent with the jurors' confident belief that they know a sick person when they see one,¹⁰⁶ and they see one when the defendant conforms to the image of "a raving maniac or complete imbecile."¹⁰⁷

99. GA. CODE ANN. § 17-7-131 (c)(3), (j) (Michie 1990).

100. *Spraggins v. State*, 364 S.E.2d 861 (Ga. 1988).

101. See, e.g., ARIZ. REV. STAT. ANN. § 13-703(G)(1), (G)(2) (1989).

102. See generally Deana Logan, *Is It Mitigation or Aggravation? Troublesome Areas of Defense Evidence in Capital Sentencing*, CAL. ATT'YS FOR CRIM. JUST. F., Sept.-Oct. 1989, at 18; Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239 (1994).

103. Valerie Hans & Dan Slater, "Plain Crazy": *Lay Definitions of Legal Insanity*, 7 INT'L J.L. & PSYCHIATRY 105, 111 (1984).

104. Perlin, *supra* note 102, at 269.

105. SUSAN SHEENAN, *IS THERE NO PLACE ON EARTH FOR ME?* (1982).

106. See generally SANDER GILMAN, *SEEING THE INSANE* (1982).

107. *Jones v. State*, 289 So. 2d 725, 729 (Fla. 1974).

Even worse, there is no safe middle ground. Evidence of mental illness is double-edged: It provides some mitigation for the defendant's crime but it also proves to most jurors that the defendant will be dangerous in the future. Lawyers who introduce evidence of mental illness without successfully conforming to the jurors' lay vision of insanity have done more than miss an opportunity; they have affirmatively wounded their client.

Thus, there will be enormous pressures on defense lawyers to craft a representation that earns the defendant membership in a preexisting, stereotypical category of "acute" or "extreme" illness, and to show that he fits into that category all of the time—that he is all sickness, no function. If you want to raise mental health at all, you had better be prepared to go for broke. The jury's choice is not between "insane" and "not insane"; it is between "insane" and "dangerous but not insane." If the jury chooses the latter, the defendant may be sentenced to death. Thus, the defendant must enact illness, but only as a character role, a "furioso," a conventional figure of madness.

Consider these forces at work in the case of Charles Silagy.¹⁰⁸ Silagy brutally stabbed and killed his girlfriend and his roommate. Silagy was interviewed by three psychiatrists before trial and represented himself to the psychiatrists as a traumatized veteran of the Vietnam War. One psychiatrist reported:

He served a total of 19 months in Vietnam. . . . In combat . . . he was exposed to a great deal of violence. He killed many of the enemy, both at a distance and close-up. He says that on several occasions he killed people with knives, sometimes by cutting their heads off. He says he was captured by the enemy three times and was subjected to torture. He says that he was also subjected to interrogation by our side [H]e also participated in torturing the enemy [H]e participated in the My Lai massacre . . .

¹⁰⁹

Silagy's lawyer duly collected this representation and naturally tried to emphasize it at trial while creating a representation of his own. Counsel offered the jury a representation of Silagy as a combat-scarred, post-traumatic stress victim who "had an awful lot of exposure to violence that most people don't have and [this was] a significant factor in the psychological makeup."¹¹⁰ He did this rather cleverly, by inserting the combat-trauma information, over the prosecutor's objections, during the cross-examination of one of the

108. *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1642 (1994).

109. 905 F.2d at 1001.

110. *Id.* at 1002.

state's psychiatrists.¹¹¹ Silagy's insanity defense failed. At the penalty phase Silagy fired his lawyer, proceeded pro se, and asked for the death penalty. The jurors granted his request. In short, everyone behaved as might be expected in a process of representation. Silagy, interviewed by professionals who he knew had him in their power, told them his story. Because the Illinois statute defined mitigating circumstances in terms of "extreme mental or emotional disturbance,"¹¹² Silagy's lawyer strove for the most acutely deranged representation of his client he could hope to support.

Years later, during the course of the post-conviction attack on Silagy's sentence, Silagy revealed that his account of his Vietnam experience was a fabrication. He had been in Vietnam, but he had worked as a clerk and a tracked-vehicle repair man.¹¹³ The representation that Silagy's lawyer presented to the jurors was a complete fantasy. Judge Kanne, writing to affirm the sentence, sardonically points out the irony of the fix in which Silagy (with the help of his unwitting lawyer) has placed himself: "In sum, it was Petitioner's own efforts to disguise the facts which led to false information being elicited by his own counsel. Moreover, Petitioner had an adequate opportunity to respond to the inaccurate nature of the information."¹¹⁴

Now, this seems fair enough when you are in the habit of seeing any trial procedure as a zero-sum battle of adversaries, but view this situation from the perspective of the jurors (or the community they embody) and it does not seem quite so satisfactory.¹¹⁵ With the benefit of Silagy's recantation, we know more than the jurors. Even so, all we really know is who Silagy is *not*—namely, the stereotype of a combat-scarred, post-traumatic stress victim. Did the jurors decide Silagy's "true" representation? Did they believe the combat saga and not consider it mitigating? Who *is* Silagy? An execution is as powerful a normative message as our system offers. But what will executing Silagy say? The jurors have been asked to send a man to his death, but if Silagy's sentence is carried out, the man who is executed—at least if he possesses any reality that cannot be inferred from the circumstances of his crimes—will be a stranger to the jurors who condemned him.

111. *Id.*

112. ILL. ANN. STAT., ch. 38, ¶ 9-1(a) (Smith-Hurd 1979).

113. 905 F.2d at 1003 n.12.

114. *Id.* at 1004.

115. John Griffins, *Ideology in Criminal Procedure or a "Third Model" of the Criminal Process*, 79 YALE L.J. 359 (1970) (disputing conception of criminal process as "zero sum" battle of irreconcilables).

VI. CONCLUSION

It would be wrong to write about this subject without recognizing the harrowing burdens that the best capital defense lawyers—the lawyers Professor White cites—have accepted. Lawyers such as Stephen Bright or Andrea Lyon, who write and speak to compel their profession to confront the ineffective lawyering characteristic of capital cases, must be painfully aware of the problematics of representation that affect their own cases.¹¹⁶ They know their clients very well; they know the versions of their clients that they laboriously piece together; they cannot help but know the difference between the two. Their silence on this point is evidence of stoicism, not a lack of insight. Imagine accepting responsibility for the decision to portray your client as retarded because it might increase his chances for mercy, when you know that the increase is marginal, and that the stigma (in the client's eyes) is terribly painful. Imagine the conversation in which you explain the decision to your client. Imagine waiting for the verdict.

When they wring what advantage they can from the existing adversary system, or help Professor White with tactical advice, the best defense lawyers are following Thurgood Marshall's credo, "Do the best you can with what you've got."¹¹⁷ But what they have is an adversary system that inevitably functions as a grammar of signs and social conventions no less troubled by the problem of representation than any other.

Capital defense lawyers must defend their client by putting forward a representation. Ordinarily, they are compelled to choose a particular representation, to commit themselves to it, to convey only that one representation, and as forcefully as possible. The representation that emerges will not be the product of this one, large strategic choice but of hundreds, even thousands, of smaller tactical decisions. Emphasize this point? Or that one? Is this detail vivid enough? Too vivid? Call this teacher to testify, or that one? A trial is a psychologically dense, complex event. Trial advocates' representations of their client will not be straightforward exposition; they will involve rhetorical devices,¹¹⁸ effects of light and shadow, bits of stage business.¹¹⁹ A point arrives at which the process of representation leaves the lawyers' hands and is submitted to the interpretive efforts of the jurors, adding an entirely

116. See, e.g., Mello, *supra* note 38, at 912.

117. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1219 (1992).

118. See Amsterdam & Hertz, *supra* note 22.

119. See Lyon, *supra* note 10.

new level of complexity.¹²⁰ Some lawyers will handle all of this very skillfully.

As Steven Marcus notes, however: “[R]epresentations remain inescapably fictions or imaginations, and there is no easy way out of this epistemological puzzle, whatever our perspective or whatever linguistic means or conceptual devices we use in our constructions or imaginations of the social world.”¹²¹ A transparent relationship between the lawyers’ portrait of the defendant and the defendant himself cannot be expected in adversary sentencing proceedings. If such a relationship appears, the appearance will be adventitious. It will be a rare case in which any party to the proceedings is even *trying* to create a transparent representation. Refractions of the sort I have been describing—radical and invalidating differences among the defendant who murdered, the representation of the defendant that was judged, and the prisoner who is executed—are probably inevitable, certainly pandemic.¹²²

For some judges and commentators, this is perfectly acceptable. For them what matters, in the end, is the murder, and so long as guilt is proven, the balance of the process of representation is largely beside the point. Whatever one might think of this as a prescription, students of the process of representation would argue that this view offers a more plausible *description* of how we actually sentence people to death than does the *Lockett-Eddings* rhetoric of individualized sentencing. Our procedures for determining the fact of a murder and the identity of a murderer are not perfect,¹²³ but they are many

120. See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1975).

121. MARCUS, *supra* note 39, at ix.

122. Among the functions of a good capital lawyer is the preservation of the appellate record, a function that, when performed well, will lay the foundations for years of appellate litigation. Frequently, during the appellate period, the character of the defendant grows more and more distant from the representation of the defendant presented at the trial. Accounts of death row life frequently describe inmates whose personalities have become almost unrecognizable during their years on death row. See, e.g., DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD* 130-32 (1995); JOSEPH INGLE, *LAST RIGHTS* (1990); ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* (1990); HELEN PREJEAN, *DEAD MAN WALKING* (1993).

The discontinuities that ordinary growth and maturity can create between representation and execution are illustrated by comparing the portraits of Christopher Burger contained in the various judicial opinions reviewing his trial and Professor Phyllis Goldfarb’s account of Burger’s last days. Compare *Burger v. Kemp*, 753 F.2d 930 (11th Cir. 1985) and *Burger v. Kemp*, 483 U.S. 776 (1987) with Goldfarb, *supra* note 35. If Goldfarb’s portrait is reliable, it would seem to indicate that the trial court representation of Burger was always a grotesque caricature. But whether that is true or not, the second portrait certainly demonstrates that the first was fully obsolete by the time of the execution.

123. See MICHAEL C. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1994). Research now proves that even varieties of evidence that had previously been considered very reliable are actually problematic. See generally ELIZABETH F. LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (2d ed. 1992); Saul Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises*

times more dependable than the only procedure we have for representing the murderer independently of his act; perhaps we should admit as much. Then what?

An enquiry into the nature of representation in capital sentencing might suggest a standard that limits the scope of death eligibility. Judge Alex Kozinski, a conservative member of the United States Court of Appeals for the Ninth Circuit, recently suggested that the enormous costs in dollars and delay imposed by the current broad applicability of the death penalty were no longer supportable, and that the death penalty should be retained, but reserved for a few of the "most serious" crimes, such as murder-for-hire, or terrorist killings.¹²⁴ What makes a particular crime "most serious" will be difficult if not impossible to articulate. But it may be argued that a murder-for-hire or a terrorist killing contributes more to a "reliable" representation of the defendant than, for example, a drive-by shooting or a domestic killing. The degree of calculation involved in murder-for-hire may or may not make it more "serious"; it will usually, however, make it more representative, and perhaps a more reliable beginning to a sentencing process.

Ultimately, however, such a limitation will marginally decrease the incidence of the problem without meeting its fundamental challenge. Serious study of the operation of representation in capital sentencing can indicate that the adversary system—not when it is in "breakdown" but when it operates as expected—is incapable of producing the reliable and individualized sentencing on which, according to *Gregg v. Georgia* and its progeny, the legitimacy of the death penalty depends. If by "effective" assistance in capital sentencing we mean contribution to a reliable, individualized portrait of the defendant, then capital sentencing is a context in which "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."¹²⁵ The structural realities of a capital trial prevent the individualized sentencing that the Eighth Amendment requires.

and Threats by Pragmatic Implication, 15 LAW & HUM. BEHAV. 233 (1991).

124. Alex Kozinski & Sean Gallagher, *The Death Penalty's Numbers*, N.Y. TIMES, Mar. 8, 1995, at A1.

125. *United States v. Cronin*, 446 U.S. 648, 659-60 (1984).

